1346.

BANK EXAMINER—DIRECTOR OF CORPORATION BORROWING FROM BANK UNDER SUPERVISION OF SUPERINTENDENT OF BANKS MAY BE APPOINTED—DISQUALIFICATION DISCUSSED.

SYLLABUS:

1. *Under the provisions of Sections 710-7 and 710-11 of the General Code, a bank examiner is subject to removal by the Superintendent of Banks if he borrows, directly or indirectly, from a bank under the supervision of the Superintendent of Banks. However, such section does not inhibit the appointment of an examiner who may be directly or indirectly indebted to such a bank at the time of his appointment.*

2. *The fact that a bank examiner is a director in a bona fide corporation and the corporation borrows from a bank in the ordinary course of business would not in itself disqualify said examiner. However, a situation could arise where the corporation is only a fiction which would disqualify an examiner.*

COLUMBUS, OHIO, December 30, 1929.

HON. ED. D. SCHORR, *Drector of Commerce, Columbus, Ohio.*

DEAR SIR:—This will acknowledge rceipt of your communication of recent date, as follows:

> "Section 710-11 of the General Code of Ohio provides that:
>
> 'Neither the Superintendent of Banks, nor any deputy, assistant, clerk, examiner or employe appointed by him, shall be interested, directly or indirectly, in any national bank or in any bank under his supervision, or be engaged in the business of banking, or directly or indirectly borrow money from any bank or person under his supervision.'
>
> In the Division of Banks, Department of Commerce, the question arises as to whether a person who is a director of a private corporation, which in the ordinary course of its business borrows money from state banks, can be legally apointed as an examiner. Your opinion will be appreciated."

In connection with your inquiry it has been noted that Section 710-7 of the General Code, which related to the employment of examiners, etc., by the Superintendent of Banks, among other things provides:

> " * * * He may remove any such deputies, assistants, clerks or examiners. He shall summarily remove any such deputy, assistant, clerk or examiner upon the violation by any such deputy, assistant, clerk or examiner of any of the provisions of Section 11 of this act (G. C. § 710-1 to 710-189)."

It is further noted that Section 11, referred to in Section 710-7, supra, is the same as Section 710-11, General Code, which you quote.

The specific question which your inquiry presents is whether or not one who is a director of a private corporation is indirectly borrowing money from a bank when the corporation in which he is a director borrows money therefrom. Ordinarily, a corporation is regarded as a separate entity and acts in its own individual capacity, and the officers thereof are not regarded as participating in a contract between the corporation and some other individual or entity. While the directors of a corporation through whom they act are the agents of the same, they are not generally regarded

as being the corporation. However, in the construction of such statutes as are being considered, the purposes of such enactment and the evil intended to be corrected must be considered. It is easy to conceive of a situation whereby an insolvent corporation might obtain improper loans from a state bank and the particular examiner assigned to the examination of said bank was a director of the corporation. Under such circumstances it is impossible to defeat the purpose of the law requiring such examination for the benefit of the public depositors.

In the case of *Bellaire Goblet Co.* vs. *City of Findlay,* 5 C. C. 418, it was held, in substance, that contracts entered into between a board of gas trustees of a municipality and an incorporated company, when a member of the board of gas trustees is at the same time an officer and personally interested in the incorporated company, were against public policy and void.

However, the above case is clearly distinguishable from the one before me for the reason that the question of one having an indirect interest was involved. In your case the director may have an indirect interest but he is not borrowing indirectly.

In the case of *State ex rel* vs. *Poor,* 110 O. S. 661, a question was presented as to whether or not a member of the Public Utilities Commission was qualified to hold the office when he was the owner of Cities Service Company stock, which said company owned stock in public utility corporations which were regulated by the Public Utilities Commission, in view of the provisions of Section 499-3 of the General Code, to the effect that no such members "shall be pecuniarily interested in any railroad in this state or elsewhere." The case was decided in favor of the Public Utilities Commissioner on authority of *United States ex rel Attorney General* vs. *Delaware & Hudson Co.,* 213 U. S. 366, and Opinion of the Justices, 75 N. H. 613. In the 213 U. S. case above mentioned, the question considered was in substance, whether a railroad company, which owned stock in other companies which shipped over its road, would come within the Commodities Clause of the Hepburn Act, which prohibited transportation by railroad in interstate commerce of any article other than timber produced by it or which it may own in whole or in part, or in which it may be interested directly or indirectly. The conclusion in said case, as set forth in the syllabus, is as follows:

> "The provisions of the commodities clause relating to interest, direct or indirect, does not embrace an interest which a carrier may have in a producing corporation as the result of the ownership by the carrier of stock in such corporation, provided the corporation has been organized in good faith."

These authorities indicate that prohibitory language such as is here under consideration will not be extended by the courts beyond its plain meaning. In this instance the prohibition is against borrowing, either directly or indirectly. To borrow means to secure something with a corresponding obligation to pay. I am not prepared to say that in ordinary business procedure one is a borrower from a bank simply by reason of the fact that he is a director of a corporation which is itself the recipient of a loan. Certainly, under ordinary circumstances, there is no personal obligation to pay, either of a direct or indirect character. It might perhaps be held that such a transaction would be one in which a director would be interested in an indirect way, yet it lacks one of the necessary incidents to a borrowing in that there exists no personal obligation to repay.

There may exist circumstances in which the corporate entity would be disregarded, as, for example, where the corporate form is used solely to cloak transactions in a way to protect what is in reality a loan to the individual. Such a situation would, however, be comparatively rare. I accordingly feel that the inhibition does not extend to prohibiting a loan to a corporation of which a bank examiner is a director, where such loan is in the ordinary course of business, unless the exceptional circumstances which I have suggested exist.

It should further be pointed out that the inhibition in Section 710-11, supra, in reference to borrowing, relates to borrowing from a bank under the supervision of the Superintendent of Banks by the examiner, and does not undertake to prevent one who may owe a bank from being appointed to such a position. In other words, the evil intended to be prevented is the borrowing by the examiner during the time he is in the service of the department.

In an opinion of the Attorney General, found in the Report of the Attorney General for the year 1913, page 822, the then Attorney General held with reference to Section 717 of the General Code, which contained in substance the same provisions as those under consideration herein, that:

> "House Bill No. 46 (103 O. L. 384) which provides that neither the Superintendent of Banks nor the examiner appointed by him shall be interested in any bank or other institution under the supervision of the Superintendent of Banks, or be engaged in the business of banking, does not apply to existing obligations at the time the law passed but would prevent the renewal of these obligations after the act becomes effective.

It is obvious that if an examiner, at the time of his appointment, was indebted to a state bank either directly or indirectly, this fact would in no wise decrease the value of the bank's claim against him. However, if he should undertake to borrow, either directly or indirectly, from a bank under the supervision of the department after said appointment, he is subject to removal under Section 710-7 of the General Code.

In view of the foregoing, it is my opinion that the statutes have not at yet gone so far as to inhibit one who is a director in a bona fide corporation, which borrows money in its ordinary course of business, from being appointed as a bank examiner.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1347.

MUNICIPAL COURT—PORTSMOUTH—POWER TO APPOINT BAILIFF AND DEPUTY BAILIFF, CONSIDERED.

SYLLABUS:

Power to appoint a bailiff and deputy bailiff of Municipal Court of the City of Portsmouth, provided for in Sections 1579-449 *to* 1579-496, *inclusive, of the General Code, discussed.*

COLUMBUS, OHIO, December 30, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This acknowledges receipt of your letter of recent date, which reads as follows:

> "Section 1579-485 G. C., (see Sec. 27 Portsmouth Municipal Court Act), reads:
>
> 'The bailiff shall be a member of the city police force and he shall serve as such during the pleasure of the court. Every police officer of the city